No. 20,719

United States Court of Appeals

For the Ninth Circuit

GEORGE R. WILLIAMS, et al.,
Appellants,

vs.

PACIFIC MARITIME ASSOCIATION,
a non-profit corporation,
et al.,
Appellees.

BRIEF FOR APPELLEES,

INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, a voluntary unincorporated association, LOCAL 10 OF INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, a voluntary unincorporated association, HARRY BRIDGES, HOWARD BODINE, L. B. THOMAS, WILLIAM CHESTER, ROBERT ROHATCH, THOMAS SILAS, CHARLES HOFFMAN, JOSEPH PEREZ, ALBERT JAMES, RICHARD HARP and JAMES KEARNEY

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This brief is filed on behalf of the above-named unions and individuals and will deal with questions of jurisdiction, with questions relating to the exhaustion of contract grievance procedures, and with questions relating to the personal liability of individual union officers for damages.

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[1]Mr. Bodine died in April of 1966; Mr. Thomas in January of 1967.

I.

STATEMENT OF JURISDICTION

Appellants have alleged that the district court's jurisdiction of this action rests on section 301(a) of the Labor Management Relations Act of 1947 (29 USCA 185[a]) which reads, in pertinent part, as follows:

> "Suits for violations of contracts between an employer and a labor organization . . . may be brought in any district court of the United States . . ."[2]

Because the district court concluded that the gravamen of appellants' case, as stated not only in their fourth amended complaint but also in the preceding four pleadings and as revealed by the affidavits, did not rest upon a violation of a contract between an employer and a labor organization, it quite correctly dismissed the action for want of jurisdiction.[3]

This court's jurisdiction of the appeal rests on 28 USCA 1291.

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[2]In their brief to this court, appellants suggest that the district court's jurisdiction may also rest upon the provisions of 28 USCA 1337 (Br. 2, 7, 37; references to Appellants' Brief are cited "Br."). The fact, however, is, as we show below, that section 1337 is not applicable to this case and, in any event, the only jurisdictional claim made in the district court was specifically bottomed on section 301(a). (Complaint, Par. 1, R. 109; references to the Record are cited "R.").

[3]Other grounds relied upon by the district court, and which equally support its order, were that exclusive jurisdiction of the matters at issue is in the National Labor Relations Board, that appellants lacked standing to sue, that appellants failed to exhaust the arbitration-grievance machinery available to them, that the Norris-LaGuardia Act (29 USCA 101) precluded the granting of injunctive relief, and that there was no jurisdiction over the individual defendants (R. 182).

II.

STATEMENT OF FACTS

This case is here on an appeal (R. 505) from an order (R. 500) dismissing appellants' fourth amended complaint.

The action was originally commenced on April 15, 1964, by a complaint for "Declaratory Relief; Mandatory Injunction; Damages" which asserted that jurisdiction of the district court was conferred by section 301(a) and by 29 USCA 401, 402 and 411.[4] At the suggestion of District Judge Wollenberg, made at oral argument on a motion to dismiss, the original complaint was amended. Two subsequent complaints asserting the same jurisdictional grounds were stricken by District Judge Weigel because each of them failed to comply with the requirements of Rule 8(a) and (e), Federal Rules of Civil Procedure. A third amended complaint, purporting to be brought "under the Declaratory Judgment Act (28 USC Sec. 2201-1); under the Injunction Act (28 USC Secs. 2282 and 2284); Section 301(a) of the Labor Management Relations Act (29 USC Sec. 185); and Title 29, Sections 401, 402(c), 411(a)(1)(2)(4)(5) USCA"[5] (R. 8) was dismissed by Chief Judge Harris on the merits and for the reasons that

> "It appearing to this court that it has no jurisdiction over the causes of action pleaded in the

[4]These references are to provisions of the Labor Management Reporting and Disclosure Act of 1959. Since the claim under the 1959 Act is not now pressed and since, in any case, that statute is clearly inapplicable, this issue is not further considered herein.

[5]Since none of these jurisdictional claims, except section 301 (a), is now pressed and since, in any case, none of them is applicable, they are not further considered herein.

> Third Amended Complaint, that exclusive jurisdiction over the alleged wrongful acts lies in the National Labor Relations Board, that this Court has no jurisdiction over the individually-named defendants, that it has no jurisdiction to issue the requested injunction due to the Norris-LaGuardia Act, that no breach of contract is or can be pleaded, that plaintiffs do not have standing to sue, that the applicable statute of limitations had expired prior to the filing of this action, and that plaintiffs, although given an opportunity to present their claim to an arbitrator, have failed and refused to do so . . .'' (R. 181-182).

An appeal from that order was taken and is presently pending in this court (No. 20301), but, so far as these appellees know, no steps have been taken to perfect that appeal.

A fourth amended complaint (the one at bench) was filed by new counsel. (R. 107). Under Rule 12, Federal Rules of Civil Procedure, appellees moved to dismiss on the grounds that the district court lacked jurisdiction and that the complaint failed to state a claim upon which relief could be granted. Affidavits were filed in support of these motions. One appellant alone filed an affidavit in opposition to the motions.

Chief Judge Harris dismissed the fourth amended complaint in an order which substantially incorporated the reasons previously assigned for the dismissal of the third amended complaint:

> ''Notwithstanding that the Fourth Amended Complaint is more artfully drafted than its predecessors, and notwithstanding that the language

and phraseology of the Fourth Amended Complaint are directly inspired by the most recent Supreme Court decisions on the subject of § 301 suits, it appears to this court that the underlying events which give rise to the allegations in the complaint, and the basic issues to which these allegations give rise, are identical to, and not different from, the events, allegations and issues involved in the Third Amended Complaint." (R. 501).

The district court's view that "no breach of contract is or can be pleaded" is clearly supported by a reading of the record.

The Fourth Amended Complaint

It is alleged in the complaint at bench that, pursuant to a collective bargaining contract between PMA and ILWU, certain rules governing the registration and deregistration of San Francisco longshoremen were adopted in 1958 (Pars. 10-11; R. 111) and,

> "That the aforesaid rules continued in full force and effect under the collective agreement aforesaid *until the adoption shortly prior to June 17, 1963 of certain new rules governing registration and deregistration of longshoremen in the Port of San Francisco* . . ." (Par. 12, R. 111; italics supplied).[6]

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[6]The "shortly prior to June 17, 1963" turns out to have been much earlier that year (Affidavit of J. A. Robertson, October 2, 1964; R. 755).

There is no doubt that, despite their present counsel's disclaimer (R. 455), appellants knew of the existence of these new rules all along. Thus, in the affidavit appended to appellants'

It is then alleged that by adopting these "new rules" appellees disregarded appellants' rights (Par. 13, R. 111; Par. 21, R. 113) and that the "new rules" were applied to appellants in an unfair manner. (Par. 38, R. 117). It is claimed that this conduct constituted a breach of "the duty of fair representation" (first and second causes of action) and resulted from a conspiracy on the part of the individual appellees to damage appellants for reasons connected with union activities (fourth and fifth causes of action). The third cause of action speaks in terms of contract violation, but it is never clear what this violation is asserted to be; indeed, reading the complaint as a whole, it is certain that the alleged contractual violation is identical with the alleged claim of a breach of the duty of fair representation.

In addition to asking for damages in sums which could aggregate *well over five million dollars* against all defendants, *including the local union,* this complaint prays for relief of a nature classically within the province of the National Labor Relations Board to give: a determination that the amended rules are invalid, an order directing appellees to cease and desist from enforcing the rules, an order for the reinstatement and promotion of appellants, an order enjoining appellees "from in any manner whatsoever interfering with the future employment of (appel-

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brief, appellant Weir refers to a meeting as early as February 26, 1963, at which he spoke with others of "the ten-hour allowable limitation" on "low-man-out violations" (Br. App. 7, 9) and to a telegram sent to the co-chairman of the joint committee on May 14, 1963, in which reference is made to "the same LMO violations *that I was charged with last February 26*" (ibid., 12; italics supplied).

lants)," an order directing appellees to make available to appellants "all facilities, rights and privileges of the jointly operated hiring hall on the same terms and conditions as applied [sic] to all other registered longshoremen," and *an order to prevent the unions from acting "as collective bargaining representatives."* (R. 121-122).

The Affidavits

The affidavits filed in support of (and, as well, the one in opposition to) the motions to dismiss establish the following:

(1) Appellants were first employed in the summer of 1959 as Class B longshoremen. Three and a half years later, early in 1963, the parties to the relevant collective bargaining contract entered into an amendment of the rules relating to Class B longshoremen. The amendment called for a review of the employment records of *all* Class B men with a view to promoting to Class A status those who met certain stated qualifications and to deregistering all others. About 450 Class B men met the standards and were advanced; about 80 men (including appellants) did not, and were deregistered.

(2) The records of *all* Class B men (not just those of appellants) were judged by certain objective criteria, insisted upon by the employer, in one instance even over the objection of the local union[7]: (a) had

[7]See *Green v. Los Angeles Stereotypers Union,* 356 F. 2d 473, where, in an analogous situation, this court approved the reversal of a local's decision by an International Union.

they committed major violations of the contract; (b) had they a record of excessive absenteeism; (c) had they cheated on the rotational system essential to the operation of the dispatch hall; and (d) had they been remiss in paying their share toward the maintenance and upkeep of the dispatch office.

(3) When the records were reviewed by a joint employer-union committee, *all* those men (not just appellants) who failed to meet the standards were notified that they were deregistered, but they were all afforded an opportunity to appear before the Joint Port Labor Relations Committee. Where errors were found, the Joint Port Labor Relations Committee corrected them. Where this Committee adhered to its original decision, the man was advised of his right to pursue the matter further through the grievance-arbitration procedures of the collective bagaining contract. Appellants were among those who initiated such grievance procedures, but, although they were specifically notified that arbitration was available to them (R. 84-85), they failed to pursue the procedures through the final step—arbitration before Professor Sam Kagel of the University of California School of Law. (R. 3).

(4) Five of the deregistered men (but not any of these appellants) filed charges with the National Labor Relations Board claiming that their deregistrations constituted an unfair labor practice. Appellants, after consulting with counsel for the National Labor Relations Board, deliberately refused to follow this route because, apparently dissatisfied with the limited

monetary redress Congress thought was proper in such cases, *they decided to attempt to mulct the employer, the unions and the union officials in damages of an astronomical order.* Subsequently, when it became apparent that the district court leaned toward the view that they should have gone to the Labor Board and after a Board Trial Examiner had rendered a favorable Intermediate Report in the case of the five who filed with the Board, appellants also filed unfair labor practice charges. Unfortunately for them, the Act's six months statute of limitations (29 USCA 160[b]) had run, and their charges were held time-barred.[8] In the case of the five who had filed with it, the Labor Board ultimately ruled, on the merits, that the deregistrations did not constitute any unfair labor practices. (*Pacific Maritime Association and International Longshoremen's and Warehousemen's Union, Local No. 10* [*Johnson Lee*], 155 NLRB No. 117, 60 LRRM 1483).[8a]

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[8]The Regional Director, acknowledging that the charges related to the "commission of . . . [a]cts arguably constituting unfair labor practices", refused to issue a complaint because section 10(b) of the Act (29 U.S.C.A. 160[b]) barred further proceedings (R. 180b). On appeal, the General Counsel sustained this ruling and advised that "*[w]ith respect to the charging parties' contention on appeal that the limitations period should be extended, the Board has no statutory authority to comply with this request.*" (R. 499; italics supplied).

[8a]Section 10(f) of the Act provides that "Any person aggrieved by a final order of the Board granting or *denying* in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in . . ." (29 USCA 160[f]; italics supplied). A Board order *dismissing* a complaint is reviewable under this section. *Jacobsen v. National Labor Relations Board,* 120 F. 2d 96.

III.

SUMMARY OF ARGUMENT

(1) The district court had no jurisdiction of this case because Congress has vested the National Labor Relations Board with exclusive jurisdiction to hear and decide appellants' claims. *Garner v. Teamsters Union,* 346 U.S. 485; *San Diego Building Trades Council v. Garmon,* 359 U.S. 236; *Local 100, United Association of Journeymen v. Borden,* 373 U.S. 690; *Local No. 207, International Association of Bridge etc. Workers v. Perko,* 373 U.S. 701.

(2) *Smith v. Evening News Association,* 371 U.S. 195 and *Humphrey v. Moore,* 375 U.S. 335, which create a narrow exception to the foregoing doctrine of preemption, do not apply here, since this case is not really one for breach of a collective bargaining contract but rather is based upon a claim that the application to appellants of a jointly agreed-upon modification to the contract is somehow "unfair." Furthermore, the National Labor Relations Board has already rejected claims that appellees' conduct was unlawful, and "serious problems" (*Smith v. Evening News Association, supra* at 197) would arise if the district court were to assume jurisdiction and to reach a contrary result.

(3) The vast differences between the Railway Labor Act (45 USCA 151 et seq.) and the National Labor Relations Act (29 USCA 151 et seq.) make totally inapposite the cases which arose under the former statute. Furthermore, since the National Labor Relations Board did not afford relief for racial

(as distinguished from "union") discrimination when *Syres v. Oil Workers International Union,* 350 U.S. 829, was decided, that decision is equally inapposite to the issues raised here.

(4) In any case, appellees have no standing to sue because they exhausted neither the grievance machinery available to them under the contract nor the administrative machinery available to them under the National Labor Relations Act.

(5) The other principal grounds relied upon by the district court, i.e. that individual union officers are not liable for damages in cases of alleged breach of contract, and that the Norris-LaGuardia Act (29 USCA 101) deprives the district court of jurisdiction to grant injunctive relief, are equally valid. *Atkinson v. Sinclair Refining Co.,* 370 U.S. 238; *Sinclair Refining Co. v. Atkinson,* 370 U.S. 195.

IV.

ARGUMENT

A. THE DISTRICT COURT HAD NO JURISDICTION OVER APPELLANTS' CLAIMS.

1. Exclusive Jurisdiction Over Those Claims Was Vested in the National Labor Relations Board.

> *"One of the central principles of our National Labor law has been the relegation to the National Labor Relations Board of the primary responsibility for the enforcement of employer and employee duties under such law."* (*Chasis v. Progress Manufacturing Company, Inc.,* 256 F. Supp. 747, 749)[9]

The major policies behind this salutary rule are (1) the fear that a multiplicity of tribunals and procedures will result in incompatible or conflicting adjudications leading to confusion in this important area of national life (*Garner v. Teamsters Union,* 346 U.S. 485) and (2) the recognition that Congress has made an affirmative decision to entrust the administration of national labor policy to a centralized agency armed with its own special procedures and equipped with its own special expertise. (*San Diego Building Trades Council v. Garmon,* 359 U.S. 236).

Appellants' charges as revealed by this record, both in the pleadings and in the affidavits, make out a claim that sections 8(a)(1) and (3), and, possibly, (2) of

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[9]This very recent opinion of Chief Judge Clary of the Eastern District of Pennsylvania contains one of the clearest expositions of the principles of law applicable to the instant case which we have yet seen. In another recent decision, rendered while this

the National Labor Relations Act were violated by the employer and that sections 8(b)(1)(A) and (2) were violated by the unions.[10]

In *Local 100, United Association of Journeymen and Apprentices v. Borden,* 373 U.S. 690, the court said:

> "Thus the first inquiry, in any case in which a claim of federal preemption is raised, must be whether the conduct called into question may reasonably be asserted to be subject to Labor Board cognizance.
>
> "In the present case, respondent contends that no such allegation can be made, but we disagree. The facts as alleged in the complaint, and as found by the jury, are that the Dallas union business agent, with the ultimate approval of the local union itself, refused to refer the respondent to a particular job for which he had been sought, and that this refusal resulted in an inability to obtain the employment. Notwithstanding the state court's contrary view, if it is assumed that the refusal *and the resulting inability to obtain employment* were in some way based on respond-

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brief was in the course of preparation, the Court of Appeals for the Eighth Circuit, in an opinion by Judge Mehaffy which is dispositive of many of the issues in the case at bench, unanimously affirmed the dismissal for want of jurisdiction *(Woody v. Sterling Aluminum Products, Inc.,* 243 F. Supp. 755; *Woody v. Sterling Aluminum Products, Inc.,* 244 F. Supp. 84) of complaints in no significant way different from the complaint at bench. *Woody v. Sterling Aluminum Products, Inc.,* 365 F. 2d 448. See also *Brown v. Sterling Aluminum Products Corporation,* 365 F. 2d 651.

[10]These sections read, in relevant part, as follows:

"8(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7 of this Act;

(2) to dominate or interfere with the formation or admin-

ent's actual or believed failure to comply with internal union rules, it is certainly 'arguable' that the union's conduct violated §8(b)(1)(A), by restraining or coercing Borden in the exercise of his protected right to refrain from observing those rules, and §8(b)(2), by causing an employer to discriminate against Borden in violation of §8(a)(3)." (at 694; italics in original)

And in *Local No. 207, International Association of Bridge, etc. Workers Union v. Perko,* 373 U.S. 701, the court said:

". . . Perko's complaint—that the petitioners caused his discharge and prevented his subsequent employment as a foreman as well as a superintendent—falls within the ambit of the unfair labor practices prohibited by §§8(b)(1)(A) and 8(b)(2) of the Act. And since petitioners' actions apparently resulted from Perko's violation of a union rule, there is a reasonable likelihood that on these premises the Board would have found such unfair labor practices to have been committed." (at 706-707).

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istration of any labor organization or contribute financial or other support to it . . . ;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. . . ."

"8(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce . . . employees in the exercise of the rights guaranteed in Section 7 of this Act . . .

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated . . ."

In a long series of cases, the National Labor Relations Board has taken jurisdiction over claims identical with those asserted here and, when such claims have been properly established, has given to the persons aggrieved the relief provided for by the Congress in section 10(c) of the Act (29 USCA 160[c].)[11] *Miranda Fuel Co.,* 140 N.L.R.B. 181; *Independent Metal Workers Union, Local No. 1,* 147 N.L.R.B. 1573; *Local 1367, International Longshoremen's Assn.,* 148 N.L.R.B. 897; *International Union, United Automobile Workers,* 149 N.L.R.B. 482; *Local Union No. 12, United Rubber etc. Workers,* 150 N.L.R.B. 312.[12, 12a]

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[11]This section reads, in relevant part, as follows:

". . . If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any . . . unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter: PROVIDED, That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: . . ."

[12]As pointed out above, the National Labor Relations Board did take jurisdiction in the case of five other deregistrants, although, *on the merits,* it found that there had not been any unfair labor practices committed (*Pacific Maritime Association and International Longshoremen's and Warehousemen's Union, Local No. 10* [*Johnson Lee*], 155 NLRB No. 177, 60 LRRM 1483).

[12a]After this brief was in galley, counsel learned that the Board's order in *Local Union No. 12, supra,* had been enforced by the Court of Appeals for the Fifth Circuit in an opinion which establishes without any question that a "breach of duty of fair representation", *infra,* is an unfair labor practice within the jurisdiction of the National Labor Relations Board. *Local Union No. 12 v. National Labor Relations Board,* 368 F. 2d 12.

This court (*National Labor Relations Board v. District Council of Painters, No. 52 etc.,* 363 F. 2d 204), as well as other courts of appeals (*National Labor Relations Board v. Local 269, International Brotherhood of Electrical Workers,* 357 F. 2d 51; *cf. Barunica v. United Hatters, etc., Local Number 55,* 321 F.2d 764), has enforced Board orders in such cases.

As the Supreme Court said in the *Garmon* case:

> "It is not for us to decide whether the National Labor Relations Board would have, or should have, decided these questions in the same manner. When an activity is arguably subject to §7 or §8 of the Act, the States *as well as the federal courts* must defer to the exclusive competence of the National Labor Relations Board if the danger of . . . interference with national policy is to be averted." (359 U.S. at 245; italics supplied).[13]

2. This Case Does Not Arise Under Section 301 of the Labor Management Relations Act.

Appellants' attempt to extricate themselves from the inevitable conclusion that their sole remedy was with the Labor Board by suggesting that section 301 confers jurisdiction upon the district court is untenable.[13a]

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[13]For more recent expressions of this view, see *Liner v. Jafco,* 375 U.S. 301, 306-307 and *Radio and Television, etc., Local Union v. Broadcast Service of Mobile, Inc.,* 380 U.S. 255, 257; *cf., Beausoliel v. United Furniture Workers,* ..... N.H. ....., 64 LRRM 2174 (November 30, 1966).

[13a]In considering the relationship between the unfair labor practice provisions of the National Labor Relations Act and section 301, the Supreme Court on January 9, 1967, emphasized that section 10(a) of the Act (29 USCA 160[a]) provides that the Board's power to prevent unfair labor practices "shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, *law* or otherwise . . ." (*National Labor Relations Board v. Acme Industrial Company,* ..... U.S. ..... at .....; 35 U.S. L. WEEK 4103 at 4105; 64 LRRM 2069 at 2071; italics supplied).

(a) The record does not reveal a cause of action for violation of a collective bargaining contract.

Appellants assert that their third cause of action alleges a breach of the collective bargaining contract and contend that section 301 gives the district court jurisdiction over that cause of action (Br. 9, 56-67).

It is true that the third cause of action, as Chief Judge Harris observed of the entire complaint, is "artfully drafted" and apparently was "directly inspired by the most recent Supreme Court decisions on the subject of §301 suits" (R. 501). But, while the third cause of action incorporates by reference some twenty of the thirty-three paragraphs of the first cause of action (Par. 34, R. 116), it conspicuously neglects to incorporate paragraphs 12 (R. 111) and 21 (R. 113) of the said first cause of action, which reveal that the collective bargaining contract, the *breach* of which is alleged as the basis for the third cause of action, was, in fact, *modified* by the parties thereto some time prior to the conduct which is claimed to constitute the breach![14] The allegations of "breach" (Pars. 46 and 47 [R. 119]) are in the barest and most conclusionary form which, in the light of the whole record, the district court was not bound to accept.[15]

The question, in view of the entire record, was whether appellants were truly claiming a breach of

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[14]The record shows the modification to have taken place months prior to the deregistration of appellants, *supra,* n. 6.

[15]Compare this court's rejection of similar "bare" allegations in *Hardcastle v. Western Greyhound Lines,* 303 F. 2d 182 and *Colbert v. Brotherhood of Railway Trainmen,* 206 F. 2d 9.

contract or, rather, were complaining that the contract had been *amended* and was being *applied* in claimed breach of their rights. The district court had the right to read the allegations of the third cause of action in the light of the entire record before it and to know that, while the third cause of action *purported* to refer to the "breach" of a collective bargaining contract executed in 1961 (Pars. 10, 47 [R. 111, 119]), that contract had in fact been modified by the parties "prior to June 17, 1963". (Par. 12 [R. 111]). Indeed, it might be argued that the third cause of action must, on its face, have been dismissed as moot since it attempted to allege a breach of a collective bargaining contract the relevant terms of which had in fact been modified before the alleged breach.

But the district court was not required to read the pleadings in so strained a manner—either against or for appellants. It had the right to conclude, construing the record as a whole, that the thrust of the charge against appellees was, not that they had breached the contract, but that they had *modified* it and *applied* it with the result that appellants were deregistered. Since appellants insist that the motions be treated as motions for summary judgment under Rule 56, Federal Rules of Civil Procedure (Br. 27), they can hardly complain if their third cause of action is read in the light of the whole record. So read, it shows that the contract in existence in June of 1963 was not the contract which they claimed was breached, but was a contract which had been previously modified by the parties and, as modified, had been applied to appellants *and all other B registrants* in June of 1963.

The record therefore does not reveal a cause of action for "violation of [a] contract between an employer and a labor organization". It shows an objection to the fact that the employer and the labor organization amended the contract and a contention that the amended contract should not have been applied to appellants. This, however, does not give rise to jurisdiction under section 301.

That appellants *purport* to state their claim in terms of breach of contract does not change the situation. It is the substance of their claim, not the form which they seek to give it, which governs.

> "Nor do we regard it as significant that Borden's complaint against the union sounded in contract. . . . *It is not the label affixed to the cause of action . . . that controls . . .*
>
> "In the present case the *conduct* on which the suit is centered, whether described in terms of tort or contract, is conduct whose lawfulness could initially be judged only by the federal agency vested with exclusive primary jurisdiction . . ." (*Local 100, United Association of Journeymen and Apprentices v. Borden,* 373 U.S. 690, 698; italics in original).[15a]

[15a] Referring to this very language, the Court of Appeals for the Fifth Circuit, in *Local Union No. 12, supra,* n. 12a said:

> ". . . the Supreme Court recently ruled that even though an employee claim is couched in terms of breach of contract, *if the claim is based essentially on union interference* with 'employment relations' it must be first presented to the Board since it may arguably involve an unfair labor practice. Accord, Local 207, International Ass'n of Bridge Workers v. Perko, 1963, 373 U.S. 701, 83 S.Ct. 1429, 10 L.Ed.2d 646. This extension of the preemption doctrine appears equally applicable *to employee claims based essentially on a breach of the duty of fair representation* to the extent that these claims often involve union interference with 'employment relations.'" (368 F. 2d at 23; italics supplied).

(b) The law does not support appellants' claim that they have a cause of action under section 301.

(i) Smith v. Evening News Association, 371 U.S. 195 and the related cases.

Appellants spend something like 15 pages (56-70) of their excessively long brief arguing that where a case does indeed present a claim of contract violation, the courts have concurrent jurisdiction with the National Labor Relations Board—a proposition which we have never controverted. To erect a straw man and then knock it down does not advance analysis of the problem at bench. The only real question is: Does the case at bench, fairly interpreted, present a suit for breach of contract or is it something else again to which appellants have attempted to affix a "301" label?

The *Smith v. Evening News Association,* 371 U.S. 195, line of cases is relevant, not to "distinguish" the "preemption" cases, but to show what the courts have said really constitutes a violation of contract under section 301.

That section, it will be recalled, gives the district courts jurisdiction over "suits for violations of contracts between an employer and a labor organization . . ." It is a *sine qua non* of its invocation, as a basis for jurisdiction, that there be at the very least a real claim of contract violation.

In *Smith,* the court held the cause of action rested on section 301 because the employer's refusal to pay full wages to the plaintiff *"violated a clause in the* [*collective bargaining*] *contract."* (at 196; italics sup-

plied). Indeed it was not seriously argued in *Smith* (as it is by appellees here) that the suit did not involve a breach of contract. On the contrary, the argument was (1) that, *conceding the breach,* the allegations made out an unfair labor practice and hence the subject matter was within the exclusive jurisdiction of the Labor Board (at 196), and (2) that an action by an individual employee to recover wages was not maintainable under section 301 since (a) the subject matter of the suit was "uniquely personal" to the employee, and (b) only parties to the contract may maintain a suit on it. (at 198).

As to the first point, the court held that the Board's authority to deal with an unfair labor practice *"which also violates a collective bargaining contract"* does not destroy the jurisdiction of the court under section 301. (at 197; italics supplied). Obviously, it follows that there is no jurisdiction in the district court unless there is a breach, whether or not there is an unfair labor practice; conversely, there must be a breach, whether or not there is an unfair labor practice, before there is such jurisdiction. As to the second point, the court held that an individual employee might, in a proper "breach of contract" case, maintain a suit under section 301 even for a claim so "uniquely personal" to him as the payment of wages. It emphasized throughout its discussion, however, that the predicate for this—or any—suit under section 301 was a "violation of collective bargaining contracts" (at 199), and a "breach of a collective bargaining contract." (at 200). *Smith* does not hold that every

complaint of unfair treatment is cognizable under section 301. Indeed, it is careful to point out that only suits for *breach* of collective bargaining *contracts* fall within the ambit of that section.

Any other construction of the section would do violence to its language and would do great mischief by vesting the courts with jurisdiction over matters which Congress has clearly reserved for the National Labor Relations Board. Indeed, the court in *Smith* acknowledged that there might be "situations in which serious problems will arise from both the courts and the Board having jurisdiction over acts which amount to an unfair labor practice. . . ." (at 197-198). But because it did not regard the case then before it as presenting such a problem (and it noted that the Labor Board was in accord), it said it would leave the resolution of that issue to another day. (at 198).

But what about the instant case? Here the Board has already ruled, in the case of five persons identically situated as are appellants, that appellees' conduct was not illegal. It has also ruled that any claims these very appellants may have had were not timely presented. Is a United States district court, under the guise of disposing of a breach of contract claim, to arrive at different conclusions on either of these questions?

Judge Clary faced this same problem in *Chasis v. Progressive Manufacturing Company, Inc.*, 256 F. Supp. 747, and resolved it as follows:

> "We are, therefore, led to the conclusion that the heart of plaintiffs' alleged injury lies solely in an

> alleged unfair labor practice, the existence of which as to several plaintiffs has already been adjudicated by the National Labor Relations Board. To allow plaintiffs . . . to relitigate the same question in this Court by broadly alleging a breach of the collective bargaining agreement would seem to conflict with the basic structure of our labor law. For these reasons, the complaint must be dismissed." (at 753).

An earlier case in the Third Circuit (*Smith v. Pittsburgh Gage & Supply Co.,* 245 F. Supp. 864, aff'd per curiam 361 F. 2d 219) was said by him to indicate a refusal on the part of that court "to allow suits broadly alleging breach of contract to needlessly circumvent the Congressional policy of the primary jurisdiction of the National Labor Relations Board." (at 752).

The Eighth Circuit Court of Appeals has, within the last months, held the same way:

> "Our remaining jurisdictional issue concerns those allegations . . . charging the Union with conspiring and colluding with Sterling, bargaining in bad faith to plaintiffs' detriment, and failing to represent plaintiffs fairly and honestly. The District Court held that the plaintiffs' charges of the Union's bad faith in negotiating the collective bargaining agreement were not predicated upon the collective bargaining agreement so as to give the court jurisdiction under §301, but rather looked beyond the agreement to the exclusive bargaining representatives' obligation of fair representation and was within the exclusive jurisdiction of the National Labor Relations Board. We think this holding was correct.

San Diego Bldg. Trades Council v. Garmon, supra; Local No. 100 v. Borden, 373 US 690, 83 S.Ct. 1423, 10 L. Ed. 2d 638 (1963); Local No. 207 v. Perko, 373 US 701, 83 S.Ct. 1429, 10 L. Ed. 2d 646 (1963). We think it is at least arguable that these allegations, if true, would be an unfair labor practice within the protection of §7 and prohibition of §8 of the Act 'although there are differing views on whether a violation of the duty of fair representation is an unfair labor practice under the Labor Management Relations Act . . .[15b] Humphrey v. Moore, 375 US 335, 84 S.Ct. 363, 11 L. Ed. 2d 370 (1964). Unlike Moore, however, plaintiffs' allegations here are not contract oriented and not, therefore, 'within the cognizance of federal and state courts.' Smith v. Evening News Ass'n, supra.

"Although *Garmon, Borden* and *Perko* involved complaints based upon a state cause of action and are not controlling in cases involving alleged violations of federal law, they are guidesome in determining the extent of §301 jurisdiction and 'when, for what kinds of breach and under what circumstances, an individual employee can bring a 301 action.' Smith v. Evening News Ass'n, supra, 371 US at 204, 83 S.Ct. at 272, 9 L.Ed. 2d 246 (Mr. Justice Black dissenting).

"*No precedent has been called to our attention and our research has revealed none that would vest the federal courts with jurisdiction under such circumstances as exist here.* INDEED, TO RULE JURISDICTION MIGHT WELL JEOPARDIZE THE WHOLE CONCEPT OF COLLECTIVE BARGAINING AS WE KNOW IT. WE ARE NOT PREPARED TO PIO-

[15b]But see *Local No. 12, supra,* n. 12a. (Our footnote).

NEER THE ALLOWANCE OF SO DRASTIC A STEP *and, for this as well as the other reasons hereinbefore expressed, the judgment of the District Court is affirmed.*" (*Woody v. Sterling Aluminum Products, Inc.,* 365 F. 2d 448, 456-457; italics and capitalization supplied).

This court anticipated these holdings in *Alexander v. Pacific Maritime Association,* 314 F. 2d 690. There, although granting leave to amend a complaint because *Smith* came down while the case was pending (at 692, 695), the court noted that the acts complained of—alleged discrimination by failure to register certain clerks (at 691) with a resulting loss of fringe benefits (at 694)—did not constitute a breach of the collective bargaining contract. With respect to the differences between a union's obligations under a contract and its duty fairly to treat the employees involved, this court said:

> "Appellants' case for a breach of contract, as we understand it, is restricted to this: that under § 14 the registered list is to be maintained at such dimensions as will meet the needs of the Port of San Francisco; that it is not so maintained; that if it were, then under § 15 these appellants would be registered; that the failure of the joint committee to register these appellants is thus a breach of contract.
>
> "But the contract as alleged does not say this. There is no promise to maintain the registration at any level. The parties to the agreement may demand additions to meet the needs of the port, but there is no allegation that such a demand has been made. It may be that Local 34 owes these

> appellants a duty to make such a demand (they themselves having demanded registration), *but if so such duty springs from the local's relationship to these appellants* AND NOT FROM THE TERMS OF THE COLLECTIVE BARGAINING AGREEMENT." (314 F. 2d at 694; italics and capitalization supplied).[16]

More recently, this court has remarked upon the fact that the Labor Board is not deprived of its primary jurisdiction over a controversy merely because it involves a collective bargaining contract cast in the language of the statute.

> "Where the . . . provisions of a collective bargaining agreement do no more than . . . prohibit conduct already defined and forbidden by the Act as an unfair labor practice, *the Board can never be ousted of jurisdiction,* for the reason that the controversy would involve no more than a breach of these negative contract provisions—*a violation of duty already 'imposed directly by the* Act', irrespective of the contract itself. Were it otherwise, it would be a simple matter to remove from the jurisdiction of the Board all unfair labor practice disputes, by the facile device of prohibiting in the collective bargaining contract all unfair labor practices defined in the Act." (*National*

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[16]The subsequent course of *Alexander* is that, after the complaint was amended, the district court ordered proceedings stayed "pending disposition of the case on arbitration"; that an appeal from that order was dismissed by this court (*Alexander v. Pacific Maritime Association,* 332 F. 2d 266); and that certiorari was thereafter denied. (*Alexander v. Pacific Maritime Association,* 379 U.S. 882).

On the question of the necessity to exhaust grievance-arbitration procedures as a pre-condition to the maintenance of a suit under section 301, see *infra,* pages 54-58.

Labor Relations Board v. C. & C. Plywood Corporation, 351 Fed. 2d 224, 227; italics supplied.[16a]

Since the case at bench is, in essence, one for an alleged breach of the duty of fair representation, the Board may not be ousted of its jurisdiction simply because the pleader seeks to cast it in terms of contract violation. Like the contract itself, the pleading should not be permitted to oust the Board of a jurisdiction which it has or to invest a court with a jurisdiction which it does not have.

The earlier cases upon which it is said that *Smith* was built (Br. 56), *Dowd Box Co. v. Courtney,* 368 U.S. 520, and *Local 174, Teamsters Union v. Lucas Flour Co.,* 369 U.S. 95, clearly illustrate the point we make—that section 301 applies to cases truly involving claims of contract breach and not to cases where the gravamen of the charge is in truth an unfair labor practice.

[16a]The Supreme Court's reversal (*National Labor Relations Board v. C & C Plywood Corp.,* ..... U.S. .....; 35 U.S. L. WEEK 4105; 64 LRRM 2065 [January 9, 1967]) of this Court's refusal to enforce the Board order in this case does not detract from the force of the language quoted in the text. Indeed, the Supreme Court's *Plywood* decision emphasizes the correctness of these views of this Court, for, despite the fact that a collective bargaining contract was involved in that case, the Court said:

> "The legislative history of the Labor Act, the precedent interpreting it, and the interest of its efficient administration thus all lead to the conclusion that the Board had jurisdiction to deal with the unfair labor practice charge in this case." (35 U.S. L. WEEK at 4108; 64 LRRM at 2068).

In *Dowd Box* the only question resolved was that a state court had concurrent jurisdiction with a federal court in a 301 suit. (368 U.S. at 504). There was no question that the case did in fact present a genuine claim for breach of a collective bargaining contract. This was not denied, and the court's summarization of the record leaves no doubt on the point:

> "A few weeks before the expiration of a collective bargaining agreement in 1957, negotiations were initiated between representatives of the union and of the petitioner with respect to proposals which the union had submitted for a new agreement. After a number of negotiating sessions, *a 'Stipulation' was signed by representatives of each party,* continuing in effect many provisions of the old agreement, but *providing for wage increases and making other changes with respect to holidays and vacation.*[17] The terms of the 'Stipulation' were later embodied in a draft of a proposed new agreement. The petitioner originally announced to its employees that it would put into effect the wage changes and other provisions covered by the 'Stipulation' and draft agreement, but *a few weeks later notified its employees of its intention to terminate these changes* and return 'to the rates in effect as of May 18, 1957' . . .
>
> "The present action was then brought in the Superior Court of Massachusetts for Worcester County by the respondents, local union officers and a staff representative of the International

[17]It is interesting to note that in *Dowd Box* no question was raised concerning the right of the parties to the collective bargaining contract to amend or modify it. This point is discussed, *infra,* pages 35-39.

> Union. The complaint . . . *asked for a judgment declaring that there existed a valid and binding collective bargaining agreement, for an order enjoining the company from terminating or violating it, and for an accounting and damages.*" (at 504; italics supplied).

There was no basis for any suggestion that in *Dowd Box,* the conduct of the employer constituted, even "arguably", an unfair labor practice.

Similarly, *Local 174, Teamsters Union v. Lucas Flour Company,* 369 U.S. 95, was, without question, an action for breach of contract, the relevant terms of which are set forth in *haec verba* at the very outset of the court's opinion. (at 96). The union, contrary to the express provisions of the contract that, pending arbitration of grievances, "there shall be no suspension of work" (ibid.), called a strike to force the employer to rehire a discharged employee during the very time that a grievance concerning his discharge was in progress. The employer sued in the state court for damages caused by the strike. The recently rendered decision in *Dowd Box* compelled the conclusion that the state court had jurisdiction. The only other questions the court considered were whether in such a case the state court was free to apply state law (it held that federal law had to be applied) and whether, as a matter of the applicable law, the strike, in the face of the contract provisions, was, as claimed, a breach of contract. As to the latter point, the court said:

> "The grievance over which the union struck was, AS IT CONCEDES, *one which it had expressly*

> *agreed to settle by submission to final and binding arbitration proceedings.* The strike which it called *was a violation of that contractual obligation."* (at 106; italics and capitalization supplied).

In *Lucas Flour* the record revealed a clear breach of an identified section of a collective bargaining contract. It revealed conduct which was and could have been nothing but such a breach. By no stretch of the imagination could the strike have been regarded as a matter within the competence of the Labor Board. Under those circumstances it is not surprising that the applicability of section 301 to the controversy was not challenged.

In none of the foregoing cases was it contended (as it is here) that the claim was anything other than that the contract had been breached.

Here, to the contrary, the district court had the right to find from the entire record before it that, in truth and in fact, "no breach of contract is or could be pleaded" (R. 501), but that appellants' claim "rather looked beyond the agreement to the exclusive bargaining representatives' obligation of fair representation and was within the exclusive jurisdiction of the National Labor Relations Board." (*Woody v. Sterling Aluminum Products, Inc.,* 365 F. 2d 448, 456).

(ii) Humphrey v. Moore, 375 U.S. 335.

Humphrey v. Moore, 375 U.S. 335, does not mark, nor was it intended to mark, any departure from the principles of *Smith, Dowd Box* and *Lucas Flour:* that

before a court has jurisdiction of a suit under section 301, it must be clear that the claim is based on a breach of contract and not simply on conduct which is, solely, essentially (or even "arguably") an unfair labor practice.

In *Humphrey,* the claim was that a decision of a joint employer-union committee was "violative of the collective bargaining contract" (at 340), because neither the parties to the contract nor the joint committee "has any power beyond that delegated to them by the precise terms of section 5 [of the contract]." (at 342). It was this claim of the violation of a specific contract clause which led the trial court to conclude that "this is an action to enforce a collective bargaining contract" (at 341)—an observation which the Supreme Court characterized as "accurate." (ibid.). Thus, *Humphrey* sustains 301 jurisdiction where, and only where, the conduct of the defendants is in *breach* of contract.[18]

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[18]Note Judge Clary's statement that, in *Humphrey v. Moore,* the record showed that "specific provisions of the collective bargaining contract" were breached and that there was "little question" that *the "real essence of the action"* was breach of contract (*Chasis v. Progress Manufacturing Company, Inc.,* 265 F. Supp. 747, 751; italics supplied) as well as Judge Mehaffy's observation that *Humphrey* was "contract oriented." (*Woody v. Sterling Aluminum Products, Inc.,* 365 F. 2d 448, 456). In *Local Union No. 12, supra,* n. 12a, the court, citing both *Humphrey* and *Smith, supra,* said that ". . . if the claim of an aggrieved employee is based *essentially* on breach of contract . . . the courts may entertain the controversy". (368 F. 2d at 22; italics supplied).

Note, also, that in *Humphrey* itself the majority explicitly said:

> "We need not consider the problem posed if § 5 had been omitted from the contract or *if the parties had acted to amend the provision*". (375 U.S. at 345, n.7; italics supplied).

While Justices Goldberg, Brennan and Harlan took a somewhat different view of the case, they did not suggest that jurisdiction *under 301* could rest on anything except a contract breach. Mr. Justice Goldberg, with Mr. Justice Brennan concurring, believed that an amendment to a contract could not be a "breach":

> "A mutually acceptable grievance settlement between an employer and a union . . . cannot be challenged by an individually dissenting employee under 301(a) on the ground that the parties exceeded their contractual powers in making the settlement." (at 352).

From his vast experience in labor law, Mr. Justice Goldberg was of the view that the contracting parties

> "were free to resolve the dispute by amending the contract to dovetail seniority lists or to achieve the same result by entering into a grievance settlement. The presence of the merger-absorption clause did not restrict the rights of the parties to resolve their dispute by joint agreement applying, interpreting, or amending the contract. *There are too many unforeseeable contingencies in a collective bargaining relationship to justify making the words of the contract the exclusive source of rights and duties.*" (at 353-354; italics supplied).[18a]

[18a] See *National Labor Relations Board v. C & C Plywood Corp.*, *supra*, n. 16a, where the Court said:

> "For the law of labor agreements cannot be based upon abstract definitions unrelated to the context in which the parties bargained and the basic regulatory scheme underlying that context. See Cox, The Legal Nature Of Collective Bargaining Agreements, 57 Mich. L. Rev. 1 (1958)." (35 U.S. L. WEEK at 4108; 64 LRRM at 2069.)

Mr. Justice Goldberg pointed out that in *Ford Motor Company v. Huffman,* 345 U.S. 330,

> ". . . this Court held that the existing labor agreement did not limit the power of the parties jointly, in the process of bargaining collectively, to make new and different contractual arrangements affecting seniority rights.
>
> "It necessarily follows from Huffman that a settlement . . . deemed by the parties to be an interpretation of their agreement, not requiring an amendment, is plainly within their joint authority. Just as under the Huffman decision an amendment is not to be tested by whether it is within the existing contract, so a . . . settlement should not be tested by whether a court could agree with the parties' interpretation. If collective bargaining is to remain a flexible process, the power to amend by agreement and the power to interpret by agreement must be coequal." (at 354-355).

Mr. Justice Goldberg, however, did not mean to suggest that the individual employee is without a remedy for "a union's breach of its duty of fair representation." (at 355). He insisted, however, that such a remedy did not arise under section 301.[19]

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[19]Mr. Justice Harlan accepted this analysis and cogently raised the next question:

> "Does such a federal cause of action [for breach of the duty of fair representation] come within the play of the pre-emption doctrine, San Diego Trades Council v. Garmon, 359 U.S. 236, contrary to what would be the case were such a suit to lie under Section 301, Smith v. Evening News Ass'n, 371 U.S. 195?" (375 U.S. at 360).

For reasons discussed below, we submit that it does and that the vast differences between the Railway Labor Act (45 USCA 151

Since the majority viewed the case as properly involving a breach of contract issue, the sustaining of jurisdiction in *Humphrey v. Moore* is perfectly understandable. (See, *supra,* n. 18) We have yet to be pointed to a single case in the Supreme Court, or in any other court, in which section 301 jurisdiction has been sustained upon a charge only that the duty of fair representation had been breached or that the parties had amended and applied (as distinguished from breached) their collective bargaining contract. Certainly, no case has ever held that section 301 may be invoked to give jurisdiction over what is really nothing more than an unfair labor practice claim merely because the claimants, dissatisfied with the relief available to them under the Congressional statute, failed timely to file charges with the Board (compare *Anson v. Hiram Walker & Sons, Inc.,* 248 F. 2d 380, 381) and then sought to dress up their claim as one of contract breach.[20]

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et seq.) under which the *Steele* line of cases (Br. 30-52) arose, and the National Labor Relations Act (29 USCA 151, et seq.), which is applicable here, compel this conclusion.

In *Local Union No. 12, supra,* n. 12a, the court said:

> "The critical area requiring jurisdictional readjustment will involve those controversies, such as the instant case, where the aggrieved employee's claim is not founded on a breach of the bargaining contract, but rather is based squarely on an alleged violation of the union's duty of fair representation. In this situation, the unfair labor practice jurisdiction of the Board will apparently be exclusive, totally preempting that of the courts. San Diego Bldg. Trades Council v. Garmon, *supra.*" 368 F. 2d at 22.

[20]Appellants discuss several lower court decisions (Br. 59-68) which we think can be disposed of briefly since they are all illustrations of the principles already considered. Thus *Plumbers and Steamfitters Union v. Dillion,* 255 F. 2d 820, involved the breach

(iii) An amendment to a collective bargaining agreement jointly agreed upon by the parties thereto is not a "violation" of the contract.

We have already adverted to the views expressed in *Humphrey v. Moore,* 375 U.S. 335 by Mr. Justice Goldberg on this question—views which were bottomed on the unanimous opinion in *Ford Motor Co. v. Huffman,* 345 U.S. 330. There is nothing in *Humphrey v. Moore* to indicate that Mr. Justice White and those for whom he spoke intended any disagreement with *Huffman.* To the contrary, Mr. Justice White's opinion refers to that case with evident approval. (375 U.S. at 349).

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by a union of a contract to supply labor; *Todd Shipyards v. Industrial Union,* 344 F. 2d 107, involved an employer's breach of a clause against subcontracting; *Gilmour v. Wood etc. Union,* 223 F. Supp. 236, like *Lucas Flour,* was a case in which the union struck in violation of a no-strike clause in the contract (*Gilmour* has relevance, though, on other points, to the case at bench: citing *Atkinson v. Sinclair Refining Co.,* 370 U.S. 238, it dismissed the suit against the *individual* defendants [see *infra*] and, citing *Sinclair Refining Co. v. Atkinson,* 370 U.S. 195, it denied the injunctive relief sought because of the Norris-LaGuardia Act [29 USCA 101]); *Fuller v. Highway Truck Drivers, etc., Local,* 233 F. Supp. 115, and *Regan v. Ohio Barge Lines, Inc.,* 227 F. Supp. 1013, are both *Humphrey v. Moore* type cases involving problems arising from the merging of seniority lists. (*Regan* has this relevance to the case at bench, however: it emphasizes the need for plaintiffs to exhaust contract remedies before they have standing to sue under Section 301 [227 F. Supp. 1014] and, like *Gilmour, supra,* in reliance on *Atkinson,* it dismissed the suit against the individual defendants).

Finally, neither *National Labor Relations Board v. Pennwoven, Inc.,* 194 F. Supp. 521, nor *Fibreboard Paper Products Corp. v. East Bay Union of Machinists,* 344 F. 2d 300, was a suit under section 301. *Pennwoven* was concerned with the applicability of the six-month period of limitations contained in 10(b) of the Act (29 USCA 160 [b]) and *Fibreboard* with a problem of collateral estoppel. Neither case contributes in any way toward a proper analysis of the problems at bench.

In *Huffman,* the court had before it an amendment to a collective bargaining contract which, because it retroactively took away employees' seniority status (345 U.S. at 335; *Huffman v. Ford Motor Co.,* 195 F. 2d 170, 172), was claimed to be beyond the power of the bargaining agent. (345 U.S. at 332).

With respect to the union's contention that the district court had no jurisdiction over the case because it involved a claim of unfair labor practice and "the National Labor Relations Act . . . vests initial jurisdiction over such an issue exclusively in the National Labor Relations Board", the court noted that the "question was not argued in the Court of Appeals or mentioned in its opinion and, in view of our position on the merits, it is not discussed here." (at 332, n. 4). The court, however, did observe that

> "Our decision interprets the statutory authority of a collective-bargaining representative to have such breadth that it removes all ground for a substantial charge that the International, by exceeding its authority, committed an unfair labor practice." (at 332, n. 4).

The court's conclusion that a union does not exceed its statutory authority by entering into an amendment to a collective bargaining contract has great relevance for the case at bench. In addressing itself to this question, and in reversing the court of appeals upon it, the court said:

> "Any authority to negotiate derives its principal strength from a delegation to the negotiators of a discretion to make such concessions and

accept such advantages as, in the light of all relevant considerations, they believe will best serve the interests of the parties represented. A major responsibility of negotiators is to weigh the relative advantages and disadvantages of differing proposals.

* * * * *

"Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. *The mere existence of such differences does not make them invalid. The complete satisfaction of all who are represented is hardly to be expected.* A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion.

* * * * *

"The National Labor Relations Act, as amended, gives a bargaining representative not only wide responsibility *but authority to meet that responsibility.*" (at 337-339; italics supplied).

It is clear from the foregoing that the union appellees in the case at bench did not exceed their authority or breach any duty they owed to appellants by accepting, in 1963, the four standards used to determine whether B men would be promoted or deregistered, any more than they exceeded their authority when, in 1959, they entered into an "amendment to the then existing collective bargaining agreement" by virtue of which amendment appellants then obtained their "B" registration. (Br. App. 2)

In *International Longshoremen's and Warehousemen's Union v. Kunz,* 334 F. 2d 165, where a claim was made that an amendment to a collective bargaining contract deprived certain employees of established seniority status, this court said:

> "The settlement of a labor dispute, *whether accomplished by amendment of the contract* or by resort to an already existing contract provision, may affect rights which *in other fields* are regarded as vested and in a manner which would be deemed *'ex post facto'.*" (at 171; italics supplied).

In *Adams v. Budd Company,* 349 F. 2d 368, employees contended that a collective bargaining contract entered into between the union and an employer, deprived them of seniority rights which they had acquired under "earlier labor contracts" (at 369). In holding that there was no jurisdiction under section 301, the court sustained as "well taken" the union's contention (which is the same as that which appellees make here) that section 301 grants jurisdiction over actions "for breach of a labor contract", and that the claim presented to it was " 'not based on a *violation* of a contract between an employer and a labor organization' but 'solely upon the adverse effect upon plaintiffs of the *negotiation* of such an agreement'." (at 369; italics in original).

The court said:

> "Here the plaintiffs do not seek redress for violation *of* a collective bargaining agreement; what they seek is redress for an alleged violation *by* a labor contract of rights which they assert

were independently, and pre-agreement, vested in them by their 'contract of hire.'

"We are of the opinion that Section 301(a) did not confer jurisdiction upon the District Court to entertain this action and that it should have dismissed it for that reason." (at 370; italics in original).[20a]

Since, on the whole record here, it is clear that the appellants' grievance relates to the amendment of the contract and the application of the amended contract to them, rather than to its claimed breach, it cannot be said that appellants state a cause of action under 301. Rather their claim is that, by modifying the contract and thereafter applying the "new rules" to them, appellees breached a duty arising under sections 7 and 8 of the National Labor Relations Act.

3. The Railway Labor Act Cases Do Not Confer Jurisdiction on the District Court.

Appellants seek to avoid the consequences of their failure to have timely submitted their claims to the National Labor Relations Board by relying upon a line of cases which arose under quite a different

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[20a]Compare *Corvallis Sand & Gravel Co. v. Hoisting and Portable Engineers Local Union No. 701,* .....Or..... (October 12, 1966); 64 LRRM 2082, in which the Oregon Supreme Court, referring to *Adams v. Budd Company, supra,* said:

"To apply § 301(a) L.M.R.A. to suits to rescind labor contracts because of unfair labor practices in their procurement would open to regulation by courts almost the entire field of unfair labor practices. We do not believe this was the intention of Congress. The words of the statute have been given a broad construction, but if any significance is to be given to the words 'for violation of contracts' a suit such as the present one does not come within its embrace." (64 LRRM at 2086)

statute. They argue that their first and second causes of action may stand because they there allege that the unions, by agreeing to the standards insisted upon by the association, breached their "duty of fair representation" and, they say, because of this the district court has jurisdiction under 28 USCA 1337. (Br. 2, 7, 37).[21]

As we have already pointed out, claims that a union has not fairly represented employees within the bargaining unit are clearly within the statutory language of the National Labor Relations Act and are matters over which the National Labor Relations Board has taken and continues to take jurisdiction. The cases urged by appellants to support district court jurisdiction of such claims are clearly not controlling, nor even persuasive, arising as they do under the vastly different statutory scheme created by the Railway Labor Act (45 USCA 151 et seq.).[22]

In *Steele v. Louisville & Nashville R.R. Co.,* 323 U.S. 192, the question presented, in the words of Chief Justice Stone, was

> ". . . whether the Railway Labor Act . . . imposes on a labor organization, acting by authority of the statute as the exclusive bargaining representa-

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[21]We have already noted (*supra,* notes 2, 4 and 5) that, despite the great number of different federal statutes to which appellants made reference, it was never suggested in any one of the five complaints they filed herein that 28 USCA 1337 conferred jurisdiction on the district court.

[22]Since employment relationships covered by the Railway Labor Act are expressly excluded from the scope of the National Labor Relations Act (Section 2(a)[2] and [3]; 29 USCA 152a [2] and [3]), railroad employees may not avail themselves of the procedures which were available to appellants under the National Labor Relations Act.

> tive of a craft or class of railway employees, the duty to represent all the employees in the craft without discrimination because of their race, and, if so, whether the courts have jurisdiction to protect the minority of the craft or class from the violation of such obligation." (at 193-194).

The court noted that it had granted certiorari because the question was "one of importance *in the administration of the Railway Labor Act.*" (at 194; italics supplied).

In *Steele,* the union had given the employer notice of its desire "to amend the existing collective bargaining contract in such a manner as ultimately to exclude all Negro firemen from the service" (at 195); an agreement to that end had been reached; and the union and the employer, acting under that agreement, had "disqualified all the Negro firemen and replaced them with . . . white men . . . all junior in seniority to petitioners." (at 196).

Having decided that such conduct violated the bargaining representative's duty fairly to represent all employees (at 202), the court turned to the only question relevant to the case at bench: May such a duty be judicially enforced or is the aggrieved party relegated to the administrative agency for relief? The conclusion, that judicial relief was available, rested on shortcomings which the court found in the Railway Labor Act, but which are not to be found in the National Labor Relations Act.

In considering this question, the court announced

the guiding principle at the outset:

> "Since the right asserted by petitioner 'is . . . claimed under the Constitution' and a 'statute of the United States,' the decision of the Alabama court, adverse to that contention is reviewable here . . . *unless the Railway Labor Act itself has excluded petitioner's claims from judicial consideration.*" (at 204; italics supplied).

What are the features of the Railway Labor Act which compelled the conclusion that that Act itself had not excluded petitioner's claims from judicial consideration and how does the National Labor Relations Act compare with them on this score? Essentially they relate to the unique administrative machinery created by the Railway Labor Act—a machinery quite different from that later established by the National Labor Relations Act.

(a) The Railway Labor Act's adjustment procedure is limited to disputes between unions and employers and makes no reference to disputes between employees and unions. (at 205). On the contrary, the National Labor Relations Act in section 8(b), 29 USCA 158(b), contains ample provisions for the adjudication of employee claims against unions.[22a]

[22a] In *Local Union No. 12, supra,* n. 12a, the court, in referring to *Steele,* said:

> "In that case, the [Supreme] Court reasoned that since the jurisdiction of the Railway Adjustment Board did not encompass disputes between employees and unions, the remedy must necessarily be sought in the courts. Since the National Labor Relations Board has, however, been given jurisdiction over employee-union disputes, the Court's logic in *Steele,* reinforced by the Board's express desire to assume jurisdiction further supports our conclusion that unfair representation cases are properly subject to Board jurisdiction." 368 F. 2d at 21.

(b) The Adjustment Board created by the Railway Labor Act "could not give the entire relief here sought"[23] (at 205) because that Board

> "has consistently declined in more than 400 cases to entertain grievance complaints by individual members of a craft represented by a labor organization. 'The only way that an individual may prevail is by taking his case to the union and causing the union to carry it through to the Board'. Administrative Procedure In Government Agencies, S. Doc. No. 10, 77th Cong. 1st Sess. Pt. 4, p. 7." (at 205).

The National Labor Relations Act, to the contrary, does not require that charges be taken up only by a labor organization. (See section 10(b); 29 USCA 160[b]). Indeed, the Board's Rules and Regulations have, from the very beginning, permitted charges to be filed by "any person".[24]

(c) The Railway Labor Act permitted unions to "prescribe the rules under which the labor members of the Adjustment Board shall be selected" and to "select such members and designate the divisions on which each member shall serve." (at 206). Thus it appeared that at least half of the members of the Adjustment Board were to be selected by the organizations against whom the complaint was to be made. The Adjustment Board was, therefore, not an independent

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[23]A phrase emphasized by appellants (Br. 35).

[24]"*Who may file; withdrawal and dismissal.*—A charge that any person has engaged in or is engaging in any unfair labor practice affecting commerce may be made by any person" (Rules and Regulations, National Labor Relations Board, Series 8 as amended, section 102.9).

governmental agency such as is the National Labor Relations Board, whose members are selected by the President and confirmed by the Senate of the United States (National Labor Relations Act, section 3[a], 29 USCA 153[a]).

(d) The Railway Labor Act provided that an employer and a union could agree to the establishment of a regional board of adjustment for the purpose of hearing disputes which might otherwise be brought before the Adjustment Board.

> "In this way the carrier and the representative against whom the Negro firemen have complained have power to supersede entirely the Adjustment Board's procedure and to create a tribunal of their own selection to interpret and apply the agreements now complained of to which they are the only parties." (at 206).

Obviously no such power resides in either employers or unions subject to the National Labor Relations Act. It was because of this shortcoming in the Railway Labor Act that the court said, in a sentence emphasized by appellants (Br. 36),

> "We cannot say that a hearing, if available, before either of these tribunals would constitute an adequate administrative remedy. Cf. Tumey v. Ohio, 273 U.S. 510" (323 U.S. at 206).

The reference to *Tumey* is revealing. That case held it to be a denial of due process to compel one to proceed before a tribunal which had a financial stake in its own decision. The tribunals set up by the Railway Labor Act were, for the reasons already noted, so regarded by the court. No one can suggest that this is

true of the National Labor Relations Board—a tribunal which is truly independent of the litigants and which has no stake in the outcome of any of the cases presented to it.

In view of all of these shortcomings in the Railway Labor Act, it is not surprising that the court said:

> "*In the absence of any available administrative remedy,* the right here asserted, to a remedy for breach of the statutory duty of the bargaining representative to represent and act for all the members of a craft, *is of judicial cognizance* . . . [T]he statutory provisions which are in issue are stated in the form of commands. For the present command *there is no mode of enforcement other than resort to the courts* . . . [*since*] *it is one for which there is no other available administrative remedy.*" (at 207; italics supplied)

Obviously, if there had been an independent agency such as the National Labor Relations Board to which the complainants themselves could have presented their claims and by which those claims could have been processed against the unions, and if the statute had provided that the determinations of the agency were enforcible in the courts of appeals (section 10(e) of the National Labor Relations Act, 29 USCA 160[e]),[25] the Supreme Court in *Steele* would hardly have concluded that, under the Railway Labor Act, there was

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[25]Indeed, the National Labor Relations Act in Sections 10(l) and (m) contains provisions for the granting of *pendente lite* injunctive relief, *at the suit of the Board,* in appropriate cases—including cases involving, as this one does, a charge of unfair practices against a union (29 USCA 160[l] and [m]).

"no mode of enforcement other than resort to the courts" and it would not therefore have created the judicial remedy which it did. It is patent from the entire opinion that the court acted as it did because of the absence of an effective and meaningful administrative remedy *under the Railway Labor Act*. That is not the case with respect to the National Labor Relations Act.[26]

This court has recognized that, for these very reasons, the Railway Labor Act cases are not governing in situations to which the National Labor Relations Act is applicable.

> "Since the complaint charges both the union and the employer with discrimination against appellants solely on the basis of their nonunion status, §§8(a)(3), 8(b)(2) of the National Labor Relations Act would arguably apply to the conduct to which appellants object. Accordingly, the district court ruled, under San Diego Building Trades

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[26]Most recently, in *Republic Steel Corporation v. Maddox*, 379 U.S. 650, the court recognized the difference between suits under section 301 and those under the Railway Labor Act, with its "various distinctive features of the administrative remedies provided by that Act . . . e.g. the makeup of the Adjustment Boards . . ." (at 657, n. 14).

On December 5, 1966, after this brief was already in page proof, the Supreme Court once again emphasized that the vast differences in the administrative remedies available under the Labor Management Relations Act, on the one hand, and the Railway Labor Act, on the other, call for different treatment of an employee's suit for breach of contract. *Walker v. Southern Railway Company*, ... U.S. ....., 17 L ed 2d 294; 35 U.S. L. WEEK 4047; 63 LRRM 2491. ("The contrast between the administrative remedy before us in *Maddox* [a case arising under section 301] and that available to petitioner [under the Railway Labor Act] persuade[s] us that we should not [require him to exhaust his administrative remedies before his resort to the courts]." 17 L ed 2d at 297; 35 U.S. L. WEEK at 4048; 63 LRRM at 2492).

Council v. Garmon (1959), 359 U.S. 236, 79 S.Ct. 773, 3 L.Ed. 2d 775, that initial jurisdiction lay exclusively with the National Labor Relations Board.

"Appellants assert that this constituted error. They rely upon a line of cases which recognizes federal court jurisdiction to enforce the duty of fair representation owed by the unions to those they represent. *Those cases, however, do not support appellants' contention. In none of them was there available any administrative remedy which would serve to deprive the federal courts of jurisdiction. Therefore the doctrine of primary jurisdiction of the National Labor Relations Board never was brought into play.*

"MANY OF THE CASES CITED AROSE UNDER THE RAILWAY LABOR ACT, *which makes no provision for administrative means for correcting breaches of the duty of fair representation . . .*

"While resort to the federal courts was proper under those circumstances, *it would be improper here in the face of the competence of the National Labor Relations Board to handle the alleged discrimination.*" (*Alexander v. Pacific Maritime Association,* 314 F. 2d 690, 691-692; italics and capitalization supplied).

All of the other Railway Labor Act cases cited by appellants (Br. 37-42) emphasize the absence of an administrative remedy *under the provisions of that statute. Tunstall v. Brotherhood of Locomotive Firemen,* 323 U.S. 210, 213; *Brotherhood of Railroad Trainmen v. Howard,* 343 U.S. 768, 774; *Conley v. Gibson,* 355 U.S. 41, 44-45.

Indeed, these cases make it clear that if there had been an administrative remedy (as there is in the case at bench), resort to the courts would have been barred.

> "For the reasons also stated in our opinion in the *Steele* case, the petitioner is without available administrative remedies, *resort to which, when available, is a prerequisite to equitable relief in the federal courts.*" (*Tunstall v. Brotherhood of Locomotive Firemen,* 323 U.S. at 213-4; italics supplied)

On the same day on which it decided *Steele* and *Tunstall,* the Supreme Court also decided *Wallace Corporation v. National Labor Relations Board,* 323 U.S. 248, in which, to quote appellants, "the concepts of unfair representation were applied to the National Labor Relations Act." (Br. 38).

Wallace's real significance for the case at bench, however, is that there the court did not feel the need, as it did in the Railway Labor Act cases, to create a judicial remedy to enforce the substantive right. It accepted the fact that Congress had, in the National Labor Relations Act, provided an administrative procedure to remedy the complained-of conduct. In *Wallace,* the parties had used that procedure and the Board had made an appropriate remedial order. What the Supreme Court did in that case was to affirm a judgment of the court of appeals enforcing that order.

Thus, *Wallace* itself demonstrates that the duty of fair representation is perfectly capable of enforce-

ment by the National Labor Relations Board[26a] and that there is no need, in any case within the competence of that Board, to create a judicial remedy to enforce that duty.

Certainly nothing in the legislative history of section 301 indicates that Congress intended any change in the law in this respect. Indeed, the evidence is impressive that the chief purpose of that section was to remove certain procedural obstacles which in 1947 were thought to stand in the way of suits against labor organizations. Thus, Senator Taft, the chief architect of the 1947 labor law revision of which section 301 was an integral part, said of this portion of the bill:

> "Mr. President, title III of the bill . . . makes unions suable in the Federal courts for violation of contract. As a matter of law unions, of course, are liable in theory on their contracts today, but as a practical matter it is difficult to sue them. They are not incorporated; they have many members; in some States all the members must be served; it is difficult to know who is to be served. But the pending bill provides they can be sued as if they were corporations and if a judgment is found against the labor organization, even though it is an unincorporated association, the liability is on the labor union and the labor-union funds, and it is not on the individual members of the union, where it has fallen in some famous cases to the great financial distress of the individual members of labor unions." 93 Cong. Rec. 3955.

[26a] *Wallace's* promise was realized in the Labor Board cases cited at page 15, *supra*, and in *Local Union No. 12, supra*, n. 12a.

While *Syres v. Oil Workers International Union,* 350 U.S. 892, presented a situation in which the post-1947 National Labor Relations Act, rather than the Railway Labor Act, was involved, it is necessary to examine the case closely in order to understand its *per curiam.*

According to the court of appeals (*Syres v. Oil Workers International Union,* 223 F. 2d 739), the complaint was brought by a Negro local and individual Negroes against a white local and the employer. It charged that, *pursuant to an agreement between the two locals* and after an election, both locals were certified as the joint bargaining representative. It further charged that thereafter the employer and the white local entered into a contract, the effect of which was "to freeze the Negro employees in their jobs and prevent their bidding on higher classifications" and that "this discrimination was based solely on race." (223 F. 2d at 740).

The district court's dismissal of the complaint upon the ground that the action did not arise under laws of the United States was affirmed by the court of appeals. Although the exclusiveness of the Board's jurisdiction was urged for dismissal (223 F. 2d at 740), the majority in the court of appeals did not discuss this question or the applicability, if any, of section 301 to the case. While the dissent of Judge Rives does not discuss section 301, it does make clear why it was appropriate, *in 1955,* to conclude that judicial relief was available to the plaintiffs *in that case.*

Judge Rives noted that the complaint was one of deprivation of employment rights "solely on account of race and/or color" (223 F. 2d at 745) and pointed out that

> "Nowhere is the Board given power to prevent discrimination because of race or color, except by very limited procedure which would afford no adequate remedy in this case." (223 F. 2d at 747)[27]

(This, of course, is not true of the case at bench. The complaint here charges discrimination against appellants, not on racial grounds, but because of their alleged opposition to the union leadership and to the unions' entry into a mechanization contract against which one appellant claims to have spoken out.[28] A claim of such discrimination is clearly cognizable under the National Labor Relations Act and in fact, as we have seen, the National Labor Relations Board has taken jurisdiction and made appropriate orders in cases presenting such claims.)

Judge Rives further pointed out that the Board decisions, as of the time he wrote, did not afford an adequate administrative remedy for cases in which racial discrimination (as contrasted with the type of

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[27]In *Alexander v. Pacific Maritime Association*, 314 F.2d 690, this court, referring to *Syres*, recognized that the acts of racial discrimination there charged were not, as here, "anti-union in character" and therefore "were not, even arguably, unfair labor practices under the National Labor Relations Act." (at 692). See *Chasis v. Progress Manufacturing Company, Inc.*, 256 F. Supp. 747, 751, n. 6.

[28]". . . because of his leadership of the B men and his open criticism of the policies of the P.M.A. and I.L.W.U. . . ." Br. 90.

discrimination charged here) was involved.

> "It is suggested that appellants could petition the Board for (1) a separate bargaining unit of their own, or (2) decertification of their bargaining representative. There is, however, no administrative means by which the [N]egro members can secure adequate separate representation for the purposes of collective bargaining.[9] Decertification by the Board would afford no remedy at all. The alleged discriminatory contract would remain in full force after any such decertification. Further, there is no assurance that the majority of the employees in the unit, who are white persons, would select another representative who would bargain without discrimination." (223 F. 2d at 747).

> "[9]See Steele v. Louisville & N. R. Co., supra. See also, Crescent Bed Co., 29 NLRB 34; Columbian Iron Works, 52 NLRB 370; Larus & Bros. Co., 54 NLRB 1345; American Tobacco Co., 9 NLRB 579; and Georgia Power Co., 32 NLRB 692." (Judge Rives' footnote).

The Board cases cited by Judge Rives reveal that in the early years of its existence the Board did indeed take the view that racial discrimination was not, under section 8 of the National Labor Relations Act, an unfair labor practice which could be remedied by the procedures provided for in section 10. The most that the Board did in such cases, as Judge Rives pointed out, was to afford some limited relief in connection with its duties under section 9 of the Act (29 USCA 159) dealing with representation matters.[29]

[29]It was not until 1964 that the Board for the first time held that a union commits an unfair labor practice when it causes or permits discrimination against employees because of their race or

It is not surprising, therefore, that, on the facts of *Syres* and the state of the Board's decisional law at that time, Judge Rives concluded that there was no adequate administrative remedy for the Negro employees.

The *per curiam* by the Supreme Court is thus completely understandable. It means only that the court agreed with Judge Rives that there was in 1955 no adequate administrative remedy which the National Labor Relations Board could have made available to correct racial discrimination.[30] It does not mean, as appellants urge, that there was no administrative remedy available in 1965 to handle their complaints of alleged discrimination of quite a different nature.[30a]

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color. *Independent Metal Workers Union, Local No. 1,* 147 NLRB 1573. Since that time the Board has consistently adhered to this position and given relief against such discrimination. *Local 1367, International Longshoremen's Association,* 148 NLRB 897; *Local Union No. 12, United Rubber, etc. Workers,* 150 NLRB 312, enforced in *Local Union No. 12 v. National Labor Relations Board, supra,* n. 12a.

[30]In view of the Board's present position (*supra,* n. 29) that racial discrimination constitutes an unfair labor practice for which it can and does give a remedy, it may be questioned whether *Syres* would today be decided as it was in 1955.

[30a]In *Local Union No. 12, supra,* n. 12a, the court (which included Judge Rives) said of *Syres:*

> "Significantly . . . . that case *clearly involved a breach of the bargaining contract. . . .*" (368 F. 2d at 21, n. 17; italics supplied).

This, of course, makes *Syres* out to be a true 301 case and not a case, as appellants would have it, involving only the breach of the duty of fair representation.

In addition, the court, in *Local Union No. 12,* said:

> "Although *Syres v. Oil Workers Union, supra, clearly involved a violation of the bargaining contract* in addition to a breach of the duty of fair representation, that decision might be interpreted as establishing the principle that the courts should retain jurisdiction over unfair representation cases

B. THE FAILURE OF APPELLANTS TO EXHAUST THE REMEDIES AVAILABLE TO THEM UNDER THE COLLECTIVE BARGAINING CONTRACT REQUIRES AN AFFIRMANCE OF THE ORDER BELOW.

The collective bargaining contract upon which this suit purports to be based contains grievance-arbitration procedures for the resolution of conflicts such as are here presented.[31] Appellants commenced, but did not conclude, such procedures under the contract. For this reason, *inter alia,* Chief Judge Harris was correct in ordering a dismissal of their complaint.

Appellants now contend that, although the contract by its very words provides an internal remedy in cases of "discrimination . . . because of membership or non-membership in the Union, activity for or

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even where no breach of the bargaining contract is involved. *Syres* arose, however, prior to the Supreme Court's comprehensive extension of the pre-emption doctrine in *Garmon,* and well before the Board began to express its intention to assert jurisdiction over unfair representation cases. Thus, *at the time of Syres,* the employee's sole remedy for a breach of the duty of fair representation lay in the courts." (368 F. 2d at 22, n. 20; italics supplied).

It is to be noted that 301 covers suits for violations of contracts "between . . . labor organizations" as well as between "an employer and a labor organization." (29 USCA 185[a]). See page 50, *supra.*

It is also to be noted that in its latest pronouncement on the subject, the Supreme Court said:

". . . courts have no jurisdiction to enforce the union's statutory rights under §§ 8(a) (5) and (1)." (*National Labor Relations Board v. C & C Plywood Corp., supra,* n. 16a; 35 U.S. L. WEEK at 4107, n. 13; 64 LRRM at 2067, n. 13.)

By a parity of reasoning, courts have no jurisdiction to enforce (save through the National Labor Relations Board's administrative order route) an individual's claim of breach of "the duty of fair representation".

[31]This is true of the contract both before and after the "new rules" *supra,* pages 5 and 6, relating to B men were adopted.

against the Union or absence thereof . . ." (Exhibit A to the Affidavit of B. H. Goodenough [Section 13]; R. 4), their claims do not fall within the "ambit" of the contract (Br. 70-72).

But appellants cannot have it both ways. Either their claims are claims of "discrimination . . . because of . . . activity . . . against the Union . . ." and therefore are within section 13 of the contract, or they are not, and, therefore, they are not claims of "discrimination" within the scope of *Humphrey v. Moore,* 375 U.S. 335. The parties to the collective bargaining contract provided, as they had the right and perhaps the duty to provide, an internal remedy by way of arbitration for such claims.

Federal labor policy (applicable to suits under section 301 [*Textile Workers v. Lincoln Mills,* 353 U.S. 448, 457; *Local 174, Teamsters Union v. Lucas Flour Co.,* 369 U.S. 95, 103]) requires that such contract remedy be exhausted before there may be resort to the courts. Congress has expressly stated this policy in section 203(d) of the Labor Management Relations Act of 1947 (29 USCA 173[d]),[32] and the federal courts have consistently encouraged the use of arbitration machinery in labor cases. The so-called "Steel Workers Trilogy" *(United Steelworkers v. American Manufacturing Co.,* 363 U.S. 564; *United Steelworkers*

[32]This section reads, in pertinent part:
"Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the *application or interpretation* of an existing collective-bargaining agreement" (italics supplied).

v. Warrior and Gulf Navigation Co., 363 U.S. 574; and *United Steelworkers v. Enterprise Wheel and Car Corp.,* 363 U.S. 593) establishes the preferred place of arbitration in our national labor scheme and makes it clear that in all cases "[d]oubts should be resolved in favor of coverage". *United Steelworkers v. Warrior and Gulf Navigation Co.,* 363 U.S. at 583. See also *Drake Bakeries v. Local* 50, 370 U.S. 241; *Carey v. Westinghouse Electric Corp.,* 375 U.S. 261.

In *Republic Steel Corporation v. Maddox,* 379 U.S. 650, an action for wages was ordered dismissed for failure to exhaust the arbitration machinery of the applicable collective bargaining contract. The Supreme Court held that the suit, under section 301, was governed by the federal law requiring exhaustion of such remedies.

> "A contrary rule which would permit an individual employee to completely sidestep available grievance procedures in favor of a lawsuit has little to commend it. In addition to cutting across the interests already mentioned, it would deprive employer and union of the ability to establish a uniform and exclusive method for orderly settlement of employee grievances. If a grievance procedure cannot be made exclusive, it loses much of its desirability as a method of settlement. A rule creating such a situation 'would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements'." (379 U.S. at 653).[32a]

[32a] In *Walker v. Southern Railway Co.,* decided on December 5, 1966, *supra,* n. 26, the Supreme Court said that in *Maddox:*

> "We held that contract grievance procedures voluntarily incorporated by the parties in collective bargaining agreements

This court has held that arbitration procedures must be exhausted before resort can be had to the courts. (*Local Union No. 11 v. Thompson,* 363 F. 2d 181.)[33]

The argument that an employee should not be compelled to exhaust the contract grievance machinery when he claims the union is hostile to him (Br. 82-86) is not relevant here, for it is grounded on the view that the employee himself would not be permitted to present his case to the arbitrator. "It would entrust representation of the employee to the very union which he claims refused him fair representation . . ." (*Hiller v. Liquor Salesmen's Union,* 338 F. 2d 778, 779).[34] Whatever may have been the terms of the contract in *Hiller,* the contract between ILWU and PMA provides that whenever an employee (registered or casual) claims "discrimination," *he* may "have the complaint adjudicated hereunder . . ." (Exhibits A [Section 17.4] and B [Section 2] to the affidavit of B. H. Goodenough; R. 446). It further

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subject to the LMRA, unless specified by the parties to be nonexclusive, must be exhausted before direct legal redress may be sought by the employee." 17 L ed 2d at 296-297; 35 U.S. L. WEEK at 4048; 63 LRRM at 2492.

[33]Other courts of appeals have also required exhaustion of contract remedies in these cases. *Woody v. Sterling Aluminum Products, Inc.,* 365 F. 2d 448; *Broniman v. Great Atlantic & Pacific Tea Co.,* 353 F. 2d 559; *Rhine v. Union Carbide Corp.,* 343 F. 2d 13; *Belk v. Allied Aviation Service Co.,* 315 F. 2d 513, *cert. den.,* 375 U.S. 847.

[34]See the treatment of *Hiller* in *Woody v. Sterling Aluminum Products, Inc.,* 243 F. Supp. 755 ("The arbitration procedure would be under the control of the very party which the employee 'claims refused him fair representation . . .'" [at 768]), affirmed *Woody v. Sterling Aluminum Products, Inc.,* 365 F. 2d 456.

provides that such remedy shall be "exclusive." (ibid.). Appellants were advised that *they* could take the matter, either in person or by counsel, to arbitration before Professor Kagel. (R. 3, 84-85). They did not then make the challenges which their counsel now make; they simply ignored the last step of the grievance procedure although they knew it was available to them. They thereby failed to exhaust their contract remedies and Chief Judge Harris was therefore correct in ruling, as an independent ground of decision, that they had no standing to bring suit under section 301.

C. UNDER FEDERAL LABOR LAW, OFFICERS OF A LABOR ORGANIZATION ARE NOT LIABLE FOR DAMAGES IN A SUIT UNDER SECTION 301.

Under federal law, which governs suits brought under section 301 *(Textile Workers v. Lincoln Mills,* 353 U.S. 448, 457; *Local 174, Teamsters Union v. Lucas Flour Co.,* 369 U.S. 95, 103), it is clear that no cause of action is created against individual union officers.

Atkinson v. Sinclair Refining Co., 370 U.S. 238:

> "When Congress passed section 301, it declared its view that only the union was to be made responsible for union wrongs . . .
>
> "The national labor policy requires and we hold that when a union is liable for damages . . ., its officers . . . are not liable for those damages." (at 247-249).[35]

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[35]This view was followed in *Gilmour v. Wood etc. Union,* 223 F. Supp. 236.

The cases cited by appellants are not to the contrary. In *Wanzer v. Milk Drivers Union,* 249 F.Supp. 664, the court stated:

> "[Plaintiff] does *not* seek *damages* against the individual defendants" (at 667; italics supplied).

United Mine Workers v. Gibbs, 383 U.S. 715, and *Price v. United Mine Workers,* 336 F.2d 771, were not suits under section 301. To the contrary, they involved the rights of the states to deal with acts of violence which the court had long since recognized were not preempted by federal labor law. *(United Mine Workers v. Gibbs,* 383 U.S. at 721).

The doctrine of pendent jurisdiction does not apply here. For, whatever may be the law of California on the tort question, the claim here is sought to be stated under section 301 and it would defeat the national labor policy to permit a state (even if this action were in a state court) to impose liability upon individuals when such liability may not be imposed upon them under the federal law.

As stated in *Local 24 etc. v. Oliver,* 358 U.S. 283:

> "We must decide whether Ohio's anti-trust law may be applied to prevent the contracting parties from carrying out their agreement upon a subject matter as to which federal law directs them to bargain. Little extended discussion is necessary to show that Ohio law cannot be so applied . . . To allow the application of the Ohio anti-trust law here would wholly defeat the full realization of the congressional purpose" (at 295-296).

See also, *Pennsylvania R.R. Co. v. Day,* 360 U.S. 548.

Thus, even if it be true that in certain tort situations California would award damages against the individual appellees, that may not be done in an action governed by contrary federal law.

The problem here is no different from that in *Dice v. Akron, etc. RR. Co.,* 342 U.S. 359, where, in speaking of another federal statute, the court said:

> "Moreover, only if federal law controls can the federal Act be given that uniform application throughout the country essential to effectuate its purposes." (at 361).

Were it argued that the complaint seeks to state two distinct claims, one against the unions and the employers under section 301 and the other against the individuals in tort, the doctrine of pendent jurisdiction still would have no application.

> "The fact that state remedies were not entirely pre-empted does not, however, answer the question whether the state claim was properly heard in the District Court absent diversity jurisdiction. The Court held in Hurn v. Oursler, 289 US 238, that state law claims are appropriate for federal court determination if they form a separate but parallel ground for relief also sought in a substantial claim based on federal law. The Court distinguished permissible from nonpermissible exercises of federal judicial power over state law claims by contrasting 'a case where two distinct grounds in support of a single cause of action are alleged, one only of which presents a federal question, and a case where two separate and distinct causes of action are alleged, one only of which is federal in character. In the former, where the federal question averred is not plainly

> wanting in substance, the federal court, even though the federal ground be not established, may nevertheless retain and dispose of the case upon the non-federal *ground;* in the latter, it may not do so upon the non-federal *cause of action.*' 289 US, at 246." (*United Mine Workers v. Gibbs,* 383 U.S. at 722; italics in original).

Here there is either one single cause of action, in which case it is clear that the national labor policy expressed in *Atkinson, supra,* is controlling; or there are two separate causes of action, in which case *Hurn v. Oursler,* 289 U.S. 238, by its own terms, does not apply. (See *Woody v. Sterling Aluminum Products, Inc.,* 365 F. 2d 448, 456.) For, where the federal policy is clearly established, state law to the contrary cannot be imported into the case under the guise of "pendent jurisdiction". *Local 20, Teamsters Union v. Morton,* 377 U.S. 252, 257-261; *cf. Dice v. Akron etc. RR. Co.,* 342 U.S. 359, 361.

V.

CONCLUSION

The record in this case demonstrates that appellants were not entitled to any relief at the hands of the district court and that, therefore, its order of dismissal was correct. This is not in truth and in fact an action for breach of a collective bargaining contract. The joint employer-union committee deregistered appellants because they were "chiselers, dues delinquents, and contract violators". (Br. App. 10).

Under the contract, appellants had the right to appeal this determination and to press, up to and through arbitration, any contention that it violated their contractual rights. They commenced, but failed to exhaust, this available contract machinery. They also had the right to press any claim of breach of the duty of fair representation before the National Labor Relations Board but, for ulterior reasons, they deliberately refrained from doing so until it was too late. The claims of others similarly situated were, on the merits, found by the Board to have been groundless.

The main question presented by this case—the authority of the parties to a collective bargaining contract to modify and administer it as against claims by individuals that such action resulted in a breach of the duty of fair representation—goes to the very heart of the collective bargaining process. The fundamental issue before this court is whether such a question is to be decided, in the first instance at least, by the specialized agency created by Congress to deal with it (subject to appropriate review of that agency's action in the courts of appeals) or whether, under the guise that it entails a breach of contract claim, such a question is to be relegated to tribunals—state or federal—which were never intended to, and are not particularly equipped to, handle it.

The Court of Appeals for the Fifth Circuit in *Local Union No. 12,* n. 12a *supra,* put it this way:

> "In light of these considerations, *we are convinced that the rights of individual employees to be fairly represented* can be more fully achieved

within the spirit of the act BY RECOGNIZING THE BOARD AS THE APPROPRIATE BODY TO MEET THE CHALLENGE OF UNIFORMLY ADMINISTERING STANDARDS OF FAIR REPRESENTATION. Its peculiar expertise with respect to the complexities of the bargaining process, its broad powers of investigation, and most importantly, its power to encourage informal settlements at the regional director level *render it better qualified than the necessarily diverse system of state and federal tribunals to meet the task of formulating and applying uniform standards of fair representation in such manner as to afford adequate protection to employee rights* WITHOUT UNDULY IMPEDING THE COLLECTIVE BARGAINING PROCESS. We have confidence in the competence of the Board to discharge this delicate task of striking a meaningful balance between its primary duty of promoting union-management relations and that of safeguarding the section 7 rights of employees, *a task which will entail nothing new to the agency initially designated as the appropriate body to construe and apply the unfair labor practice provisions of the act as well as its representation provisions.*" (368 F. 2d at 23-24; italics and capitalization supplied).

For the foregoing reasons,[36] the judgment of the district court should be affirmed.

Dated, San Francisco, California,
January 30, 1967.

GLADSTEIN, ANDERSEN, LEONARD & SIBBETT,
By NORMAN LEONARD,
Attorneys for Appellees Above-named.

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

NORMAN LEONARD,
Attorney for Appellees Above-named.

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[36]The other grounds relied upon by the district court in support of its order are equally valid. The Norris-LaGuardia Act (29 USCA 101) deprives the district court of jurisdiction to grant injunctive relief *(Sinclair Refining Co. v. Atkinson,* 370 U.S. 195; see also *National Labor Relations Board v. C & C Plywood Corp.,* n. 16a, *supra;* 35 U.S. L. WEEK at 4108, n. 15; 64 LRRM at 2068, n. 15), and exemplary or punitive damages are not awardable in a case such as this (cf. *United Mine Workers v. Patton,* 211 F. 2d 742).